

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0051
Sales/Use Tax
For the Years 1995-1997**

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ISSUES

I. Sales Tax Assessment—Booth Rental

Authority: 45 IAC 2.2-4-8; 45 IAC 2.2-4-9

Taxpayer protests the Department's timely proposed assessment of tax on the taxpayer's rental of vendor booths.

II. Tax Administration—Penalty and Interest

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2; IC 6-8.1-10-1

The taxpayer protests the imposition of a negligence penalty and interest.

STATEMENT OF FACTS

The taxpayer operates two flea markets. At the flea markets, the taxpayer rents booth space to vendors and operates food concessions. The flea markets are open to the public three (3) days a month. Vendors pay rent on booths supplied by the taxpayer. The taxpayer had two types of vendors: (1) occasional; and (2) long term (consecutive months). The taxpayer collected sales tax on occasional vendors, but only collected tax for the first month on vendors who returned monthly. Also, some category (2) vendors opted to pay their rental amounts annually. Neither side disputes whether category (1) vendors are taxable, but there is a dispute regarding (2).

I. Sales Tax Assessments—Booth Rental

DISCUSSION

The auditor argues that since the flea markets are only open three days a month, and that the buildings are locked when the flea markets are not open (and per the auditor, the vendors do not have access save for the three days each month), the taxpayer's rental of booths was taxable under 45 IAC 2.2-4-8, which states in pertinent part, "Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths ... is a retail merchant making retail transactions...." "Accommodation," for our purposes, is defined at 45 IAC 2.2-4-9(a)(7):

- (a) For purposes of the state gross retail and use tax, an “accommodation” is any space, facility, structure, or combination thereof including booths, display spaces and banquet facilities, together with all associated personal or real property (including land), which is intended for occupancy by human beings for a period less than thirty (30) days including:

* * * *

- (7) Booths or display spaces in a building, coliseum or hall.

The auditor’s position is that vendors are only renting for three days, and not the full month. As for the vendors that pay annually, the auditor characterizes those payments as “simply three days rent paid several months in advance.”

The taxpayer also relies on 45 IAC 2.2-4-8, but cites different language for a different result:

- (b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

The taxpayer provided the Department sample copies of contracts between the taxpayer and vendors. The contracts are signed monthly and contain the following relevant language:

I [Vendor] am a permanent dealer in the [flea market] of [City of X].

YES NO [The Vendor is to circle the appropriate answer]

The taxpayer states “permanent” means that the vendor will have the same, discrete, booth space for a continual period (unlike the non-permanent, occasional vendors).

The taxpayer notes:

While open to the public only three days each month, Vendors rent the space for the entire month, or longer period. Vendors may store merchandise in the space on a permanent basis so long as the rent is paid. Moreover, many Vendors leave their fixtures, booths, tables, advertising materials, and banners in the rented space from month to month.

Also, at hearing, the taxpayer disputed whether or not vendors had access to their booths. The taxpayer stated that if, for example, a vendor wanted access to their booth space when the flea market is closed, that the vendor has a contact person, who also does custodial work for the flea market, that can let them inside.

Also of import is the example provided by 45 IAC 2.2-4-9:

If a person moves into a room for an indefinite period, but pays weekly, sales tax must be collected until a person has rented the room for longer than 30 consecutive days.

To recapitulate: the contracts between the taxpayer and its vendors are monthly (the contract does not say for “three days a month”); taxpayer states that the vendors can and do leave various

items (listed earlier) in their specific booth for periods that exceed thirty days; vendors have access to the booths by going through the contact person who can let them inside the flea market when it is closed (also, the taxpayer states that the flea markets are open to all of the vendors the day before the three days the flea market is open to the general public); and the rental booth is for a specific, discrete, location in one the flea markets. Based upon these facts, the Department finds for the taxpayer.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Penalty and Interest

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty. The Indiana Code section 6-8.1-10-2.1 imposes a penalty if the tax deficiency was due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2(b) states that negligence is "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer."

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was "due to reasonable cause and not due to willful neglect." To establish this the "taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed" 45 IAC 15-11-2(c).

Beyond the issue discussed above in part I, which the taxpayer has prevailed on and therefore cannot be a basis for negligence, the taxpayer also was assessed for food sales made at its concessions at the flea markets. Under Indiana law food sold at the concessions is taxable, and the taxpayer explains that the "error resulted from Taxpayers' understanding that the only tax imposed on food and beverage sales was the county tax." Since 45 IAC 2.2-5-43 clearly indicates that so-called "food for immediate consumption" is taxable, the taxpayer was negligent in this respect.

Additionally, The taxpayer also protests the imposition of interest. Pursuant to IC 6-8.1-10-1(e) the Department may not "waive the interest imposed under this section."

FINDING

The taxpayer's protest of the penalty and interest is denied.

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